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CITATIONS

724707—46

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 721

RAYMOND N. SABOURIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 20–22) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 31, 1946. (R. 23.) The petition for a writ of certiorari was filed on November 26, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTION PRESENTED

Whether the District Court had the authority or power to impose a sentence of imprisonment upon the petitioner after entry by him of a plea of guilty to the first count of the indictment.

STATUTES INVOLVED

Internal Revenue Code:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to collect and pay over tax, or attempt to defeat or evade tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution. (26 U. S. C. 145.)

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

* * * * *

(b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such defi-

ciency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612 (d) (2). (26 U. S. C. 293.)

SEC. 3761. COMPROMISES.

(a) *Authorization.*—The Commissioner, with the approval of the Secretary, or of the Under Secretary of the Treasury, or of an Assistant Secretary of the Treasury, may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense; and the Attorney General may compromise any such case after reference to the Department of Justice for prosecution or defense. (26 U. S. C. 3761.)

STATEMENT

The indictment in this case was filed on October 19, 1944 (R. 3), and contained eight counts. In the first seven counts of the indictment the petitioner was charged with having willfully attempted to defeat and evade his individual income taxes for each of the calendar years 1935 to 1941, inclusive. In the eighth count the charge was the making of a false statement within the purview of Section 35 (A) of the Criminal Code (18 U. S. C. 80).

In count one of the indictment the petitioner was charged with having filed a false and fraudulent delinquent income tax return for the calendar year 1935 on April 12, 1939, stating therein

that he had a net income of only $3,459.41 and that he owed no tax thereon. The indictment charges that, in truth and in fact, the petitioner had a net income for that year of $13,891.63 and owed a tax of $696.36 (R. 4–7).

After the return of the indictment the petitioner communicated with the Office of the Attorney General of the United States, offering to compromise his civil and criminal liability. On November 9, 1945, the offer of compromise was accepted on behalf of the Attorney General, pursuant to Section 3761, Internal Revenue Code (R. 11–12). Notice of acceptance of the offer was given to counsel for the petitioner by letter of November 9, 1945, from the Department of Justice, which embodied the terms of the settlement and which read as follows (R. 11–12):

> This refers to your letter of September 12, 1945, addressed to the Attorney General, wherein you offered on behalf of your client, the defendant, to pay the sum of $27,100.04 and to enter a plea of guilty to Count One of the indictment in settlement of the matter. The money payment covers the defendant's liability for taxes, penalties and interest for the years 1935 to 1941, inclusive, and the plea is to be in discharge of the indictment.
>
> We are pleased to advise you that the offer referred to has been accepted on behalf of the Attorney General, subject only to the condition that you execute a stipu-

> lation disposing of the case now pending in the Tax Court. The stipulation is in the hands of the United States Attorney.

In compliance with the terms of the settlement, the money payment having been made, the Tax Court proceeding dismissed, and the plea of guilty entered, the petitioner on January 2, 1946, appeared before the Honorable Robert A. Inch in the United States District Court for the Eastern District of New York. At that time the compromise agreement was brought to the court's attention. It was also pointed out by the Assistant United States Attorney that the plea was to be entirely unconditional. With this observation, counsel for the petitioner agreed. (R. 8–11.) The court then imposed a sentence of nine months' imprisonment under count one of the indictment (R. 12–13), and on motion of the Assistant United States Attorney, dismissed the remaining counts (R. 10).

An appeal was taken from the District Court's judgment to the Circuit Court of Appeals for the Second Circuit, wherein it was contended that the trial court, in view of the compromise, was without power to impose a criminal penalty upon the petitioner, and that the sentence imposed by the court subjected the petitioner to punishment twice for the same offense, contrary to the Fifth Amendment. The Circuit Court of Appeals affirmed the judgment of the District Court. (R. 23.)

ARGUMENT

The petitioner argues that the settlement as described in the Department's acceptance letter constituted a complete disposition of both his civil and criminal liabilities. He urges that the word "penalties" as used in the letter, was included therein as one penal sanction upon which another (the term of imprisonment) could not be superimposed without doing violence to the Fifth Amendment.

The construction placed by the petitioner on the Department's acceptance letter is entirely erroneous. It was a routine notice sent by the Department, pursuant to the regular practice, stating that the petitioner's obligations were discharged in part, and that the ordinary consequences should follow from the plea of guilty. If anything else had been intended or expected by either party, certainly the Government would have moved for a dismissal of the entire indictment, and the petitioner would not have entered an unconditional plea of guilty to count one. Moreover, no other kind of a plea of guilty would have been possible, since no prosecutor can assume the prerogative of the court to impose a proper sentence. The settlement did "dispose" of the indictment in so far as the prosecutor was concerned. The function of the prosecutor does not extend beyond the conviction, whether it be obtained by plea of guilty or by verdict. A plea of guilty is a conviction.

Kercheval v. *United States,* 274 U. S. 220. At that point the responsibility devolves upon the court. And a plea of guilty, such as this one, entered pursuant to a settlement, requires the imposition of sentence or the entry of judgment by the court. *Burr* v. *United States,* 86 F. 2d 502 (C. C. A. 7), certiorari denied, 300 U. S. 664; *United States* v. *La Fontaine,* 54 F. 2d 371, 373 (D. Md.).

The word "penalties" as used in the Department's acceptance was not intended to include the criminal penalty involved in count one of the indictment.[1] That term should be construed in the light of the entire sentence in which it appears. When so construed, it is plain that it was not intended to exonerate the petitioner from the criminal penalty involved in count one; otherwise, the plea of guilty would not have been exacted as a part of the petitioner's contribution to the settlement.[2] It would be absurd to assume

[1] The civil penalties which were included in the compromise settlement are not essentially criminal. *Helvering* v. *Mitchell*, 303 U. S. 391, 402. Consequently, the settlement of those penalties alone would not affect the petitioner's criminal liability.

[2] The petitioner's reliance on the case of *United States* v. *Chouteau*, 102 U. S. 603, is of no avail. There, the Government, without specific reservation, accepted from a distiller a money payment in compromise and settlement of "indictments and prosecutions", and in consequence of the settlement, dismissed the indictments. Thereafter, in a suit instituted by the Government against the distiller's surety to recover civil penalties on the same defaults, this Court held

that the Attorney General, when exacting from the petitioner a plea of guilty, intended to usurp the functions of the court by arrogating to himself the power to enter a nolle prosequi to count one of the indictment after the petitioner had entered a plea of guilty thereto in open court. Since the money settlement did not envisage the exaction of a penalty under count one, the sentence of imprisonment imposed by the court under that count could not constitute a second or double punishment in violation of the Fifth Amendment. Thus, the sentence by the trial court, imposed after a voluntary and unconditional plea of guilty, was eminently proper.

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that the terms of the compromise settlement included prosecutions for civil penalties. In the case at bar the Government made a specific reservation as to the criminal penalties involved in count one, and, far from abandoning the entire criminal liability, as it had the civil penalties in the *Chouteau* case, it insisted, while making the settlement, upon its right to exact a criminal penalty with respect to that count by expressly requiring the petitioner to enter a plea of guilty thereto. The *Chouteau* case is plainly not in point; nor is the decision of the court below in any respect in conflict with it.

CONCLUSION

The decision of the court below is correct, and there is no conflict of decisions. It is, therefore, respectfully submitted that the petition should be denied.

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DECEMBER 1946.

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